In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1700

ROBERT V. HARMASH AND
JAMES P. KEHOE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 72-1730

JOHN C. KIFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the prohibition against commercial distribution of marijuana set forth in 21 U.S.C. 841(a)(1) is unconstitutional and alternatively that the classification of marijuana as a Schedule I controlled substance, 21 U.S.C. 812(b), is arbitrary and capricious.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

Petitioners Kiffer and Harmash were also convicted of conspiracy to possess and distribute marijuana, in violation of 21 U.S.C. 841 and 846. Harmash was sentenced to three and one half years' imprisonment, Kiffer to three years, and Kehoe to two and one half years. All received, in addition, a fine of $2,500 dollars and a special parole term of three years. The court of appeals affirmed (Pets. Apps.) on April 18, 1973. The petition in No. 72-1730 was filed on June 21, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no cause for further review.

Petitioners were arrested on December 1, 1971, in Queens County, New York, by agents of the Bureau of Narcotics and Dangerous Drugs. They were found in a warehouse in which approximately two tons of marijuana was stored. Petitioners do not question the sufficiency of the evidence to support their convictions.

Following their trial in October 1972, a post-conviction hearing was held to determine the constitutionality of those sections of the statute which make criminal the possession of marijuana with the intent to distribute it.[1] During the hearing, petitioners introduced scientific evidence in support of the contention that there is no rational basis for the inclusion of marijuana among the schedules of illicit drugs contained in 21 U.S.C. 801 *et seq.* and that there is, in any event, no rational

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[1] The court of appeals correctly noted that this case does not present the broad question of the constitutionality of the criminalization of marijuana, but rather the question of the constitutional right to sell marijuana in large quantities for profit (Kiffer Pet. App., p. 2908).

basis for including marijuana as a Schedule I drug along with heroin, the opiates and L.S.D. These contentions are fully discussed and properly rejected by the court below, on whose opinion we rely in urging that the petitions for certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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